EMPLOYMENT TRIBUNALS

Claimant: Zheng-Liang Zhi

Respondent: Dynex Technologies Europe Limited

Heard at: Birmingham (via CVP) **On:** 21 to 25 March 2022

Before: Employment Judge Edmonds
Members: Mr R Virdee
Mrs M Howard

Representation
Claimant: Mr G Price-Rowlands, Counsel
Respondent: Ms K Moss, Counsel

This has been a remote hearing which has been consented to by the parties. The form of remote hearing was V (fully remote). A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing.

RESERVED JUDGMENT

1. The claimant's claim for unfair dismissal succeeds. The claimant is awarded a basic award of **£807** and a compensatory award of **£4,328.57 net**. The recoupment provisions do not apply.

2. The claimant's claim for breach of contract succeeds. The claimant is awarded **£3,525.90 net** in respect of notice pay**.**

3. The claimant's claim for holiday pay succeeds. The claimant is awarded **£280.84 gross**. The respondent shall be entitled to make deductions from this payment in respect of income tax and national insurance contributions.

4. The claimant is awarded **£3,131.77 gross** in respect of unpaid wages between 4 April 2020 and 23 April 2020. The respondent shall be entitled to make deductions from this payment in respect of income tax and national insurance contributions.

5. The claimant's claim for race discrimination fails.

REASONS

Introduction

1. The claimant was an Assay Development Team Leader within the respondent, a global healthcare business which develops and manufactures laboratory analysers and tests. The claimant's employment started on 7 August 2017 and ended on 23 April 2020. The claimant has brought claims for race discrimination, unfair dismissal, breach of contract and holiday pay. The ET1 was presented on 2 August 2020, with ACAS pre-claim conciliation having been completed beforehand.

2. This case is about a performance process and the eventual dismissal of the claimant. The claimant argues that the respondent's treatment of him was discrimination because of his race. There was initially a dispute as to whether the claimant had been resigned or been dismissed, however the respondent informed the Tribunal at the start of the hearing that it now accepted that the claimant had in fact been dismissed and that the claimant had been notified of that in advance of the hearing. The respondent further conceded that it had not followed a fair procedure when dismissing the claimant and therefore that the claimant's had been unfairly dismissed, that unpaid wages were due to him in respect of the period between the date on which they had originally asserted he resigned and the actual dismissal date, that notice pay was due to him and further that some holiday pay would also be due to him. However, the respondent disputed the level of compensation that would be due to the claimant, arguing both that he contributed to his own dismissal and that he would have been dismissed fairly in due course, had a fair procedure been followed.

Claims and Issues

3. The issues in this case had been agreed at a previous preliminary hearing on 25 January 2021. However, in light of the respondent's concessions set out in paragraph 2 above, we revisited those issues at the start of the hearing and redefined them as follows (removing those which were now agreed):

Preliminary Issues

1. Has the claimant issued all of his claims within the prescribed time limit for his claim to have been issued?

Liability Issues

Unfair dismissal

It was accepted that the claimant was dismissed on 23 April 2020, and that the dismissal was unfair within the meaning of s94(1) Employment Rights Act 1996 ("ERA"). It was further accepted that this was an "ordinary" and not "constructive" unfair dismissal.

2. *Was the claimant dismissed for a reason permitted by the ERA? (s98(2)(b) ERA). The respondent says that the claimant was dismissed due to a misunderstanding.*

3. *If so, did the respondent act reasonably in the circumstances by treating it as a sufficient reason for dismissal?*

4. *If so, then was dismissal of the claimant within the range of reasonable responses by an employer in the position of the respondent?*

Direct race discrimination Equality Act 2010 s13 and 39

5. *Did the respondent treat the claimant less favourably in comparison to a hypothetical comparator who does not possess the same protected characteristic, namely being of Chinese ethnic/national origin by:*

    a. *Failing to give the Claimant a reasonable opportunity to review the written performance review before the meeting to discuss that review;*
    b. *Making unfair criticisms of him in that performance review;*
    c. *Instituting a PIP without reasonable cause;*
    d. *Unreasonably criticising his performance during the course of that PIP;*
    e. *Criticising him for his conduct with Sameera Amin;*
    f. *Removing Sameera Amin from his line management;*
    g. *Failing to deal with his discrimination complaint reasonably or at all;*
    h. *Dismissing him.*

6. *If so, has the Claimant proved primary facts from which the Tribunal could properly and fairly conclude that the difference in treatment was because of the protected characteristic?*

7. *If so, what is the Respondent's explanation? Does it prove a non discriminatory explanation?*

Breach of contract

8. *How much notice pay is owed to the claimant (it being accepted that notice pay was owed)?*

9. *What wages are due to the claimant in respect of the period between 4 April 2020 and 23 April 2020 (it being accepted that wages were due to him)?*

Holiday pay

10. *How much holiday pay is owed to the claimant (it being accepted that holiday pay was owed in relation to the period between 4 April 2020 and 23 April 2020)?*

Remedy

11. *In the event that the Claimant is successful, the following issues of remedy fall to be determined.*

12. If discrimination is shown under EqA, should an award for injury to feelings be made and, if so, how much?

13. If the dismissal is found to be unfair (whether or not it is also found to be discriminatory) what is the appropriate level of compensation having regard to the following:

14. Should any compensation as is awarded to the Claimant be altered to reflect:

a. Polkey principles;
b. Contributory fault;
c. Any failure to comply with a relevant ACAS code;
d. Any failure to take reasonable steps to mitigate loss;
e. Aggravated damages

Costs

15. Should an award of costs be made against the respondent due to the respondent's late concessions regarding unfair dismissal, notice pay and holiday pay?

Procedure, documents and evidence heard

4. The Tribunal heard evidence from the claimant on his own behalf, and from Ms Karen Freeman (Vice President, Human Resources) and Mr Roger Budd (Director Clinical Assay Development) on behalf of the respondent. Ms Freeman gave evidence from the United States of America, however permission was sought and granted for her to do so from the Foreign, Commonwealth & Development Office.

5. The Tribunal was also presented with a witness statement from a Dr Lan Wang, however she did not give oral evidence to the Tribunal. The claimant said that this was because she could not take time off from work to do so (she no longer worked for the respondent). The Tribunal read this witness statement, however have only given it limited weight because Dr Wang was not present to be questioned on her evidence, and it was apparent from the respondent's evidence that the respondent disputed the evidence provided.

6. There was an initial Bundle of 403 electronic pages, although due to pages inserted within the Bundle after pagination it should be noted that the pagination ran to 392 pages, split into sections with the page numbers referencing both the section and the page. Page references within these Reasons are to the hard copy (and not electronic) page numbering. During the course of the hearing we were also presented with a number of additional documents by each party, some of which the parties agreed to add to the Bundle and some of which were opposed by the other party. Where there was opposition, we heard submission from each party and then determined whether or not to allow the late addition of those documents, in some cases agreeing to do so and in some cases not. It is worth however referencing two specific issues which arose:

a. there were certain documents which were added without objection on the first day of the hearing, and evidence then heard on them, only for the claimant's representative to then object to their addition

two days into the hearing. In respect of those documents, we felt that given that they had already been added to the Bundle and evidence given on them, it would not be appropriate to then remove those documents from the Bundle.

b. On the fourth day of the hearing, as all the evidence was concluding (and the claimant had completed his evidence the previous day), it became apparent that the claimant wished to argue that he should be entitled to a significant sum of money in respect of loss of stock options, but had given no evidence in this regard. Having heard representations from both parties, the Tribunal agreed to allow the claimant to be recalled to give further evidence on this point in the interests of justice and in accordance with the Overriding Objective. The Tribunal was particularly mindful that the claimant's representative had tested positive for COVID-19 and had suggested that he had omitted to ask the claimant about this issue because of his own health.

7. The Tribunal informed the parties that we would only read documents that we were specifically taken to by the parties.

8. As outlined above, the claimant's representative had unfortunately tested positive for COVID-19 before the hearing commenced. As the hearing was via CVP, this did not cause an issue with the hearing itself, however the Tribunal ensured on each day that it asked the claimant's representative about his health to assess whether he was fit to proceed. On each day the claimant's representative confirmed that he was, but in the early days did ask that the claimant give evidence first rather than him being required to cross-examine witnesses (which the Tribunal agreed to without objection from the respondent).

9. A considerable amount of evidence was put forward during the hearing, and a considerable number of documents referred to. Whilst the Tribunal does not refer to every single point below, it has considered all of the evidence when reaching its findings and conclusions.

10. During evidence, reference was made to separate discussions which had taken place between the parties during March 2020, which were without prejudice in nature. The Tribunal discussed with the parties what their view was regarding the admissibility of such matters, and the parties agreed that the fact that such conversations had taken place could be noted for the purposes of the race discrimination claim, but that these discussions were a "protected conversation" under section 111A of the Employment Rights Act 1996 for the purposes of the unfair dismissal claim and therefore the fact of their existence could not be taken into account. We followed these principles in deciding the case.

Findings of fact

11. The claimant is of Chinese national and ethnic origin.

12. The claimant commenced employment with the respondent, a global healthcare business headquartered in the United States of America, as an Assay Development Team Leader on 7 August 2017. At the time Mr Budd's

witness statement was prepared, the respondent had 104 employees globally.

13. During the claimant's employment, the respondent had around 12 staff at the claimant's place of work, although that site has now closed and all the staff there are about to be or have been made redundant.

14. The respondent does not have a formal performance policy, although it does have an internal HR function which is available to support managers with performance issues. Employees are provided with training on harassment and discrimination.

15. The claimant was employed under the terms of an employment contract dated 7 July 2017 (page 2-41). Based on the claimant's length of service at the time his employment ended, either party was required to give the other one calendar month's notice of termination. He was entitled to 25 days' holiday per annum in addition to bank and public holidays. The contract contained, amongst other things, a confidentiality clause. In addition to his contract of employment, we were shown a Notice of Stock Option Grant (unpaginated). This set out that the claimant could exercise the option for 3 months following the termination date of his employment. Those stock options were only worth a cash value if the company was floated, which did not happen prior to the claimant's dismissal and in fact has not happened to the date of the hearing.

16. The claimant was one of six new employees recruited by his manager, Roger Budd, at around that time. Of those six, three were white British, two (the claimant and Dr Wang) were of Chinese origin and one was of Indian origin. The claimant said that he and the other two non-white colleagues were all pushed out. We accept that the three non-white employees have since left the respondent. In Dr Wang's case this was a performance dismissal, however we heard no evidence from either party about what happened in relation to the third employee and therefore draw no conclusions in that regard. In relation to Dr Wang, whilst the respondent argued that it was an amicable exit, the documentation we saw showed that she was unhappy about being dismissed and we find on balance that she did believe herself to have been unfairly treated. The documentation also showed that the respondent did consider offering Dr Wang an alternative (more junior) position as an alternative to dismissal, but ultimately did not do so.

17. Much was made at the hearing as to whether Mr Budd was competent in his role. Whilst the claimant did indeed have a PhD whereas Mr Budd (and certain others within the respondent) did not, we were satisfied that Mr Budd did appear suitably qualified for the position he held. It is also worth noting that Mr Budd's wife, Caroline Budd, also held a senior position within the respondent and was involved in various matters relating to Mr Budd's team.

18. Overall we found all of the witnesses to be honest and transparent in the evidence they gave. However, there were significant differences between their accounts of events, notably between Mr Budd and the claimant in relation to both the claimant's performance and the performance process itself. We believe that on the whole these differences are caused by the

different perceptions that each of them have about events. We would add that the claimant spoke in inflammatory terms both to the Tribunal itself and during his employment with the respondent about a number of the respondent's employees, which largely appeared to be without justification. Whilst we find that the claimant did genuinely hold those opinions, that does not mean that we found those opinions to be justified.

19. The Tribunal also found generally that Mr Budd and the claimant had very different views of the claimant's performance and very different management styles. Mr Budd came across as having a methodical management style whereas the claimant was much more animated in his approach. The claimant saw himself as a high achiever and focused very heavily on his technical competence, believing that Mr Budd was less capable than he was, despite being his manager. The claimant also did not appear to focus on the line management side of his role, something which was of concern to Mr Budd. We saw nothing which suggested that Mr Budd was in any way incompetent. We accept that the claimant was also technically competent in a number of areas, however we also find that the claimant refused to accept his line manager's point of view and to adapt his style to fit the requirements of the role (particularly in relation to communication style).

<u>The early months of the claimant's employment</u>

20. It was accepted by both parties that there were issues with the claimant's performance in the initial months of his employment. One key issue was the claimant's competence to be a "team leader", however the claimant asserted that at this stage he was a "trainee" and therefore at that stage was not ready to take on team manager responsibility. However, whilst there is always some element of learning in any new role, the claimant was clearly employed to be a team leader and there was nothing in any of the documentation to suggest that he had been told that he would have a period as a "trainee", so we find that these were genuine and real concerns on the respondent's part.

21. Detailed "New Employee Progress Review" forms were completed during the initial months (and signed by the claimant so we accept their contents were accurate), highlighting clearly the respondent's various concerns and areas for improvement, and also acknowledging those areas where improvement had been made. Examples of concerns raised include:

    a. On 14 September 2017 (page 2-59), concerns were raised about language / communication effectiveness, ability to lead his team and lack of preparation for training. The claimant was asked to consider if a team leader role was right for him.

    b. On 5 October 2017 (page 2-65), again concerns were raised about the claimant's ability to work as a team leader. The possibility of him changing to an independent scientist role (without line management) was explored but the claimant said he wanted to continue in a team leader role. In evidence, the claimant said that the criticisms he received were actually not his fault but were the fault of the person training him. We find that the concerns were genuine and that the respondent was acting reasonably to try to resolve them. We also find

that the claimant's refusal to accept responsibility is symptomatic of the claimant's lack of perception about his interactions with others and general intransigence**.**

c. On 16 November 2017 (page 2-69), the claimant acknowledged that he still made some mistakes but identified other areas where he felt he made good progress. Mr Budd acknowledged this but said that he was still not competent in some processes, and that he had concerns as outlined on an attached sheet he had prepared (page 2-71). At this stage he warned the claimant that continued lack of performance could not be maintained, and that if he was unable to demonstrate competency then either his employment would be terminated or he could consider a standalone role (not as a team leader).

22. The respondent's concerns were so great at this point that it actually prepared a draft dismissal letter for the claimant on the grounds of unsatisfactory performance on 3 November 2017. This was never given to the claimant, as Mr Budd decided to give the claimant another chance. We find that the respondent's concerns were valid and genuine, and the fact that Mr Budd did not dismiss him shows Mr Budd's commitment to try to support the claimant and give him every opportunity to succeed. We also find that this suggests that Mr Budd did not have a predisposition against the claimant because of his race or national origin.

23. There was then a further review meeting on 22 January 2018 (page 2-73). This records that the claimant had made some improvements but that a number of improvements were still required and the claimant had not achieved "level 6" as would be required in his Team Leader role. We find that the criticisms of the claimant at this point remained fair and valid. Mr Budd acknowledged the claimant's commitment to learn and said he was confident the claimant would continue to improve.

24. The claimant was ultimately signed off as competent on level 6 work on 14 June 2018, around 10 months after his employment started. It therefore took a considerable length of time and support for the claimant to achieve the standard expected of him in his role, and we find that the respondent could reasonably have decided to end the claimant's employment at an earlier stage due to his struggles in achieving this level of competency.

<u>Patricia Gallagher and Sameera Amin</u>

25. Around March 2018 there had been an incident between Ms Gallagher and Ms Amin, where Ms Gallagher admonished Ms Amin for something she had done. At that time Ms Gallagher was Ms Amin's line manager. This incident was allegedly witnessed by Dr Wang, who said she heard Ms Amin crying loudly. It is alleged that Ms Gallagher had made Ms Amin very upset, but faced no punishment for this (whereas the claimant did when Ms Amin got upset at a later date). It is correct to say that Ms Gallagher did face no punishment, however it is difficult to know exactly what happened between Ms Gallagher and Ms Amin as no one else heard the exact conversation (in contrast to the later conversation between the claimant and Ms Amin which we address later in these findings). We find that Ms Amin was definitely however upset following the incident with Ms Gallagher and was crying.

26. There was other criticism made by the claimant of Ms Gallagher's performance, suggesting that she had failed several times at a particular project revolving around implementing some kind of transfer to the United States. However, we find that there was no evidence of incompetence on her part and whilst she did not have a PhD, we do not view that as meaning that she was necessarily less competent than the claimant.

Line management

27. One of the claimant's responsibilities was line management. Initially he managed two individuals, Connor Dannheimer and Louise Kelly, however in or around April or May 2018 Louise Kelly's line management was moved to Ms Gallagher, whilst Ms Amin moved to report to the claimant (page 2-40). There was significant disagreement as to the date of this change, the claimant saying that it happened in May, a few weeks before Ms Kelly went on maternity leave, the respondent saying (and providing a document to support this, page 5-393) that it happened in April 2018. We do not believe the date to be important, what is important is the reason for the change in line management and whether it related to Ms Gallagher's treatment of Ms Amin (as outlined above). We find that it was not related to Ms Gallagher's treatment of Ms Amin, but was instead to reflect that Ms Kelly was going on maternity leave, and that Ms Amin was better suited to the claimant's type of work (research and development, rather than prototype work).

2018 Performance Review

28. The claimant had his first annual performance review on 2 November 2018 (page 2-80). Overall, the review showed that the claimant was generally performing to a satisfactory, and in some areas high, level. The form included space for the claimant to rate himself, and then for the respondent to comment and include it's own rating: the claimant rated himself generally higher than the respondent did. The respondent's overall rating was 3 for core competencies and 3.95 for personal/company goals (out of 5). Mr Budd gave evidence that the official rating would only be "exceeds expectations" rather than "meets expectations" if the rating was 4 out of 5, and we accept that, but on any reading his performance was at least average, if not better than average at this point.

The claimant's 2019 issues

29. In early 2019, the claimant had a disagreement with the respondent about a tax issue. The claimant had been taxed on a health benefit but thought that this should not have happened. Following an investigation, the respondent concluded that the tax treatment had been correct but, as they could not be sure as to whether the claimant had been told about the tax treatment in advance, the respondent decided to compensate the claimant, specifying that this was without admission of liability (page 2-110). We find nothing to suggest inappropriate behaviour on the respondent's part in the way it dealt with this issue, and nothing unusual about the payment being made despite the lack of admission of liability: this was simply a means of drawing the issues to a close.

30. In October 2019 the respondent's CEO, David Sholehvar, visited from the United States of America. There was a meeting at which the CEO, Mr Budd

and the claimant were all present, where the claimant openly criticised the work that Mr Budd and his team were doing. We find that his behaviour shocked and embarrassed Mr Budd. The claimant's position is that he would have said the same to anyone, even the prime minister, because this is "freedom of speech". We find that the claimant would have used a very direct tone, in all likelihood using inappropriate language, and that this would have caused embarrassment to Mr Budd, both for himself and for his team. We find the claimant's behaviour to have been inappropriate, and that following this meeting Mr Budd would have reasonably had concerns about the claimant's lack of collaboration and his behaviour as a team leader.

31. A further tax issue arose in late 2019 (page 2-140 and 2-135), relating to whether the claimant had been taxed twice on medical insurance. We were shown an email exchange where the claimant had raised the matter with the respondent, and the respondent had asked its external advisors to comment (pages 2-135 to 2-152 and 2-159 to 2-171). We cannot say what the correct tax position is based on the information we have seen, but what we can see is that the claimant used inflammatory language in his emails with the respondent about the issue, accusing the respondent and/or its third party provider of using "fake data" and that information was "fabricated" (2-160 to 2-161). In evidence the claimant explained that he calls things that are not right "fake" and we accept that this may be how the claimant uses that language, however we find that it was reasonable for the respondent to view this as a serious and inflammatory accusation by the claimant. We find that this incident did affect the relationship between the claimant and the respondent.

<u>Mr Budd's performance concerns</u>

32. Following the second tax incident, Mr Budd decided to start keeping a note of his concerns in relation to the claimant (page 2-172). We find that this was prompted by a combination of the second tax issue and by the CEO visit, which had caused Mr Budd to question the claimant's communication style. It was suggested that this document had been prepared "after the event" however we accept Mr Budd's evidence that he prepared it as a contemporaneous document, adding each event to the list as they happened (with the exception of the CEO visit incident which he added some weeks later), between November 2019 and February 2020.

33. We heard evidence about each of the issues noted in the document prepared by Mr Budd. Generally speaking, the claimant defended his performance on each point and sought to blame others for any failings. We find that, overall, whilst the claimant is technically competent in his role, his abrupt style and refusal to accept input and guidance from others, led to Mr Budd reasonably having concerns about the claimant's performance overall. A common theme was that, when someone else (whether Mr Budd or another colleague) suggested an alternative approach to the claimant, he would refuse to consider the possibility of there being another option and would sometimes use antagonistic language to critcise colleagues. Likewise, when Mr Budd suggested that the claimant had made an error, the claimant automatically denied this and was entrenched in his view that his way of approaching tasks was the correct one. In some cases it may have been, however his tone of voice was antagonistic and not collaborative. We also find that on balance Mr Budd has shown that there

were occasions on which the claimant did make mistakes. It could be said that Mr Budd is micro-managing the claimant at this point, and we do find that Mr Budd is quick to criticize the claimant due to the damage to their relationship caused by the tax issue and CEO visit. However we find that the criticisms made were reasonable and that some micro-management was inevitable in the context of the concerns he had. We find that the claimant and Mr Budd were both becoming entrenched in their views at this point.

34. One particular issue was raised where the claimant was asked to order additional samples from a supplier. The claimant ordered 5, however the respondent ordered 50 and provided around 25 or 30 of these to the claimant for his project (it was originally suggested that the respondent had ordered 177 but it was accepted in evidence that was not correct). The claimant said that it was the supplier's errors, resulting in false positives, which meant that more than 5 were needed, and that 5 would have been the correct number if Mr Budd had used a better supplier. We find that the claimant would have known what supplier was being used, so if he felt that this supplier would result in more false positives, then he should have taken account of that.

The job application

35. By the end of January 2020, the claimant was looking for other roles outside of the respondent, and was invited to interview for a particular role on 3 February 2020. This company was not a direct competitor of the respondent but was in a related industry. The claimant was therefore looking to leave the respondent, which we find was due to the ongoing breakdown in the relationship between himself and Mr Budd and what the claimant saw as unwarranted criticism.

36. It was alleged that, during the application process, the claimant disclosed confidential information to the respondent (for which he could have been dismissed). This was discovered by the respondent carrying out a search of the claimant's computer and finding a presentation prepared by him for the interview. We believe that this search was only carried out because (as we detail below) there was subsequently a complete breakdown in the relationship between the parties and, had those later events not happened, the respondent would never have known about this. We accept that there may have been some information within the document which would disclose to an expert the type of work the claimant had been doing.

The Claimant's performance review November 2019 to February 2020

37. The respondent's performance review process is that the employee first completes a self assessment, followed by the manager's assessment, and then the review takes place. The claimant completed his section in November 2019, and it is clear that he viewed himself as a high performer (page 2-154).

38. There is a dispute about when Mr Budd completed the respondent's section of the form. The claimant says that he was not provided it until some time after the performance review meeting, which would have been in breach of

policy. We accept that, if that were the case, it would have been a breach of policy.

39. We find that Mr Budd had completed his sections of the form prior to the performance review meeting despite not signing it until some time afterwards (page 2-158), because we saw an email from Ms Freeman dated 27 January 2020 which suggested that all assessments had been completed on the system, and that the reviews would be made available to all employees at the review meetings (page 3-325). As to when the claimant was provided with a copy, Mr Budd gave clear evidence that he provided a copy by hand at the end of the meeting, although didn't formally sign it off in the system until some days later. There were various emails sent subsequent to the meeting which reference the document: one from the claimant asking for time to "digest" it (page 2-202), and a chain between Mr Budd and Mr Wolfert where Mr Wolfert suggests that the claimant has it (page 2-201), and Mr Budd does not respond to deny that. Having considered the documents and the evidence, we prefer Mr Budd's evidence that the claimant was provided a copy by hand: had he not, we believe that the claimant would have chased for it and/or that Mr Budd would have corrected Mr Wolfert's assumption that the claimant had it. We also find that Mr Budd's treatment of the claimant was consistent with his treatment of other colleagues, including Alex de Bruin and Patricia Gallagher.

40. By the time of the performance review, Mr Budd had contacted Ms Freeman to explain about his performance concerns and Ms Freeman had recommended that the claimant be put on a Performance Improvement Plan ("PIP"). The purpose of the PIP is to help employees improve and make sure they are fully aware of the concerns. We find that this was an appropriate course of action for Mr Budd to take.

41. One concern raised about Mr Budd's involvement was that one of the issues raised related also to Mr Budd's wife and therefore he would not have been impartial. Whilst that is true and we can understand the concern, in such a small company (within the UK at least) there was no one else really suitable to manage the claimant's performance on a day to day basis. In addition, Mr Budd made sure that Mr Wolfert attended meetings and was involved, which helped mitigate any risk, and the majority of issues did not relate to Mrs Budd.

42. At the performance review meeting on 4 February 2020 a number of concerns were raised. The claimant confirmed initially in evidence that he did not feel this was related to his race, but then contradicted that a short while afterwards by saying that it could have been. When asked directly which allegations he felt were related to his race, he said that there were two: an allegation that he was treated differently to Ms Gallagher in relation to Ms Amin, and an allegation that he was unfairly criticised whereas Mr de Bruin (who he felt was a worse performer) was not.

43. In evidence the claimant said that two of his peers, Mr de Bruin and Ms Gallagher were bad performers but were not critcised, specifically Mr de Bruin's worksheets were poor and Ms Gallagher failed a complete a transfer to the US to develop a prototype in the MMRV project on two occasions, whereas the claimant felt that he did not fail at anything. We prefer Mr Budd's evidence that neither were poor performers. In relation to Mr de

Bruin**,** we find that the specific criticisms levelled by the claimant were minor in nature and, taking into account that at the relevant time he had only been in the company for a few months, were reasonable errors to make. In relation to Ms Gallagher, we accept that she did ultimately succeed in her project and that there were no concerns regarding her performance.

44. The claimant and Mr Budd's views on the claimant's performance were vastly different. In evidence the claimant said that he accepted there were improvements he could make to his communication style but nothing else. There were specific categories set out in the performance review form and we set out some examples below (we do not set out every category, only those we believe to be particularly relevant):

    a. In the category "Perform at a High Level and Achieve" the claimant gave himself a rating of 5 – "Superior" whereas Mr Budd awarded him "2 – Needs Development".

    b. In relation to the category "Focus on the customer", the claimant stated in the form that he had solved a particular technical problem regarding sample incubation times, whereas Mr Budd responded to say that the idea had actually been from Caroline Budd. In the Bundle we saw an email exchange from August 2019 (page 2-119) which showed that Mrs Budd had indeed solved the issue, and the timing of August aligned to her account and not the timescales put forward by the claimant. It is possible that both the claimant and Mrs Budd had the same idea, and the claimant was not party to the August emails and therefore might not have realised what she had done.

    c. In relation to "collaborate everyday", again the claimant awarded himself a rating of "5 – Superior" but Mr Bunn awarded "2 – needs development". Mr Bunn referred to the claimant being dismissive of colleagues' ideas, specifically Mr De Bruin. In evidence the claimant referred to Mr De Bruin as "incompetent" which we find shows that the claimant was indeed dismissive. We also find that this is an inappropriate way to talk about a peer.

45. Overall the claimant was awarded an average score of 1.7 out of 5, with a score of 2.6 out of 5 for core competencies and 0.8 out of 5 for company/personal goals. He was clearly underperforming at this stage and, whilst Mr Budd may have been influenced by the tax issue and CEO issue, we find that his concerns were reasonable and genuine. In addition we find that the claimant's mannerisms when dealing with the tax issue and CEO issue were in itself a valid concern.

46. Mr Budd later recorded in an email to Ms Freeman and Mr Wolfert (page 2-199) that the claimant accepted that he needed to improve. The claimant's position is that communication was an area for improvement but that he was technically very competent. It is clear that the claimant feels strongly that the criticism levelled at him in the annual performance review documentation is unfair. We find that it was not. We accept that the claimant was technically competent in a number of areas, however the incidents raised with him were genuine and furthermore there were serious and reasonable concerns about the claimant's role as a team leader – technical

competence was only one element of his role, as was made clear to him when he first joined the company and had initial performance issues.

The PIP

47. The claimant was informed that he was to be placed on a performance improvement plan ("PIP") which would last for 60 days. There were three possible outcomes:

    a. The claimant would resolve all issues and the PIP would cease

    b. The claimant would resolve some issues and then resolution would be required within the 60 days; or

    c. If the claimant was unable to resolve the issues, his employment would be terminated.

    The claimant says that he was not told this. We cannot say what he was told but we accept that 60 days was the intended PIP duration, as this is consistent with what had been done in Dr Wang's case, and we note that Mr Budd had handwritten notes stating this (page 2-195). Dr Wang was the only time that Mr Budd had dealt with a PIP before.

48. On 4 February 2020, after the review meeting, the claimant told Mr Budd that if he was asked to leave, he would. Mr Budd told the claimant that he was not asking him to do so. Mr Budd relayed this conversation over email to Ms Freeman (page 2-199) and Ms Freeman replied that if the claimant decided to go, "good". We do find that this suggested that it would be helpful to the respondent if the claimant resigned. By this point, the claimant's attitude towards colleagues had caused issues and Ms Freeman would have been frustrated with him. However, at no point did she say that he should be asked to leave and in fact it was clear that pressure was not being placed on the claimant to do so: Mr Budd told the claimant that the purpose of the PIP was to resolve issues, and then reported back to Mr Wolfert and Ms Freeman that the claimant loved his job.

49. The first PIP meeting took place on 6 February 2020 (although the document itself appears to be incorrectly dated 4 February) (page 2-212). The claimant had requested additional time to prepare, which had been refused. We find that this was rather quick given that it was only on 4 February that the performance review meeting took place, and we believe that the claimant should have been given additional time to prepare for that meeting, especially given he specifically requested it.

50. As was the case with the performance review meeting, there was a dispute as to when the claimant was provided with his notes from the PIP meetings. The notes from the PIP meeting on 6 February 2020 were only signed by Mr Budd on 17th February, and by the claimant on 20th February. We find on balance, having considered all the evidence, that this was not provided to the claimant until 17 February, and that it should have been provided to him earlier. During this meeting the claimant's performance was discussed further with specific examples given and a 9 point improvement plan laid out.

The review meeting on 13 February

51. The next review meeting took place on 13 February. There was again a review document prepared by Mr Budd (2-217), signed by Mr Budd on 17 February and by the claimant on 20 February. This suggests that it was provided at the same time as the previous PIP document. Mr Budd felt that there were some areas where progress had been made, but others where it had not. We find that the fact that Mr Budd openly recorded the positive progress made as well as the negative, and also commented that the claimant was clearly trying, demonstrates that Mr Budd was committed to the PIP process and had not formed preconceived ideas of its outcome.

52. The notes suggest that the claimant did agree with some of the criticisms raised, however in evidence the claimant disputed this. We find that the claimant agreed with Mr Budd on some points because he was fighting for his job and wanted to avoid an argument. However, we do also find that the criticism was valid: on some points in evidence the claimant suggested that he was too busy to achieve the targets set in the time available, however some of the targets related to his manner of interacting with colleagues and therefore should not have required additional time to be spent on these.

Sameera Amin and Connor Dannheimer annual review

53. The claimant undertook performance reviews for Ms Amin and Mr Dannheimer in February 2020. Prior to the reviews, the claimant had discussed their "level" of competency with Mr Budd and Mrs Budd. The claimant had suggested level 3, however Mr and Mrs Budd had said level 2, and the claimant ultimately agreed.

54. The claimant said in evidence that he had been told to treat Ms Amin "without sympathy" and pointed us to a document which he said set this out (page 2-272). We find that this was not the case: all that document told the claimant to do was to make sure that Ms Amin's time was properly utilised, which is very different to saying that someone should be treated without sympathy and, if he interpreted those words in that way, is symptomatic of his difficulties in navigating line management responsibilities.

55. At their respective performance review meetings, the claimant told Ms Amin and Mr Dannheimer that he personally had felt they were level 3 but that Mr and Mrs Budd had placed them at level 2. The claimant said in evidence that he felt that this was the right thing to do, however Mr and Mrs Budd found it embarrassing and inappropriate.

56. We find that it was indeed inappropriate to reveal these private discussions, and that it would naturally be upsetting for the individuals to hear that management disagreed on their skill level. The claimant's decision to tell Ms Amin and Mr Dannheimer is an example of his general failure to understand his role both as a team leader and as Mr and Mrs Budd's subordinate.

57. Ms Amin had an underlying mental health condition, which was known to the respondent, and became upset during the performance review upon being told that the claimant felt she should be level 3. She left the meeting and the workplace, and called in sick the following day. Whilst off sick, Mr Budd heard a conversation where Ms Amin called the claimant to say that she was off sick that day. The claimant did not ask how she was, or any

other “niceties”. This is again reflective of poor line management skills on his part.

58. In addition, the claimant had been asked to ascertain his team’s progress desires at the performance review meeting. He did not ask about this at the performance review meetings, but later revealed to Mr Budd that he had already asked the question but had not had a response from his team. Mr Budd noted this on a PIP form in manuscript. In evidence the claimant said that his team had lost the chance to have any input because they had failed to reply. We find that this in itself demonstrates poor leadership on his part: rather than ignoring the issue entirely, he should have asked them why they had not answered him and chased for an answer.

59. As a result of what happened with Ms Amin, and to protect her health, a decision was made to move her reporting line away from the claimant. We find that this was genuinely an attempt to protect Ms Amin from what Mr Budd reasonably viewed to be poor line management from the claimant. This was particularly important given Ms Amin’s mental health at that time.

PIP review meeting 21 February 2020

60. There was a further PIP meeting on 21 February 2020 (2-273), which was signed by Mr Budd and the claimant on 24th and 26th February respectively.

61. The PIP details a number of issues with the claimant’s performance. Again, we find that the claimant agreed at the time but in reality privately disagreed with the criticisms made. During the hearing we heard evidence from Mr Budd and from the claimant about the various criticisms reported in the PIP: it was clear that the claimant feels that Mr Budd is in fact less competent that himself, however Mr Budd’s explanations for the criticisms were logical and we accept them. For example, a particular issue arose about whether there was a difference between fungus and precipitate and we prefer the explanation given by Mr Budd (that there was).

62. Another criticism was that the claimant was behind on writing up experiments. The target was to do them within 48 hours, but he still had some from prior to Christmas, so it is clear that he was significantly behind (although it was suggested that he did ultimately catch up on these).

Intended PIP of 28 February

63. We were shown a further document as part of additional disclosure (page 5-397), which detailed the claimant’s progress against the PIP for a meeting on 28 February. That meeting never happened because by this point the claimant had indicated he wanted to resign, as set out below. The notes show that there still significant weaknesses, but equally recognise some progress. We find that this was a balanced and fair document.

The claimant’s potential resignation and grievance

64. On 25 February 2020 the claimant said he no longer wanted to work for the respondent but said he would talk to his wife before confirming. The next day he said that he did wish to leave, but at the end of the project he was working on. This would have been likely to be at some point between June and the end of the summer.

65. At around this time the parties entered into confidential without prejudice discussions. As explained above, for the purposes of the claimant's claim of unfair dismissal, we ignore this because this was a protected conversation. For the purposes of the claimant's claim for race discrimination, we note that there were some discussions but no more**.**

66. From 4 March 2020 the claimant stopped attending work, and sent internal emails indicating that he was leaving the respondent's employment.

67. The claimant emailed Ms Freeman on 5 March 2020 (page 2-291). In this email he raises three specific concerns about his treatment and asked if he could "appeal". One of the concerns raised was that he felt that the treatment he had received in relation to his interactions with Ms Amin amounted to race discrimination: this is the first time that race discrimination was raised by him. We find that this email constituted a grievance. We note however that the only allegation of race discrimination was in relation to the issues around Ms Amin (and not about the performance process more generally).

68. Ms Freeman replied on the same day, saying that the claimant had not been dismissed but had resigned (with the leave date still to be confirmed), and therefore there would be no "appeal" process. She did not respond to his specific complaints, and did not reference his allegation of discrimination. We find that Ms Freeman did genuinely believe that he was resigning.

69. The claimant replied to say that he had not resigned (2-290). The respondent now accepts that this was the case, but says that at the time there was a genuine misunderstanding. We accept that there was a genuine misunderstanding up until the point of this email, however once the claimant had replied to say that he was not resigning, the respondent could not reasonably have concluded that the claimant had resigned.

70. The claimant was not paid his salary in the April payroll. He notified Ms Freeman of this (page 2-293) and she replied on 23 April 2020 (page 2-294), saying that he had resigned with effect from 4 March 2020 and so would be paid up to 4 April 2020 (allowing for a one month notice period).

71. We agree with the respondent's concession that the claimant had not in fact resigned and that what happened on 23 April 2020 amounted to a dismissal by the respondent.

72. On 20 March 2020, the claimant collapsed in the street and was taken to hospital with an atrial fibulation. The claimant says that this was due to the stress of what had happened. We have been provided with a document showing that he attended a hospital emergency department at the time but nothing which shows the likely cause of this collapse nor its severity, and therefore we make no finding in this regard.

73. The claimant accepted that, following his dismissal, he did not take any action in relation to his stock options.

74. The claimant secured a new role at Accendolab Limited from 19 October 2020. His annual salary was £40,000 per annum, and in December 2020 he received a bonus of £200 entitled "Year End Bonus". His contract of

employment stated that he would be entitled to join a pension scheme from the outset of his employment.

75. We find that, had the claimant not been dismissed and his relationship with Mr Budd improved, he would have remained in the claimant's employment and, if he did continue to look elsewhere for other opportunities, he would not have done so with urgency. However he would have ultimately left by the time of the closure of the claimant's office in early 2022 at the very latest. The claimant suggested that either his continued employment would have ensured that the UK arm of the business did not get closed down, or that if it did he would have relocated to the USA. We do not consider the claimant's continued employment would have made a difference to the long term viability of the respondent's UK operations, and the fact that the claimant thinks it would have done is symptomatic of the claimant's overly optimistic view of his own performance. Whilst he might well have genuinely considered a move to the USA, we have no information to suggest whether any role might have been available and/or whether the claimant might have been suitable for it.

Law

76. We set out below the key legal principles, and although we do not mention every case by name, we have considered the submissions put forward by both parties.

Unfair dismissal

77. Section 98 of the Employment Rights Act 1996 ("ERA") provides that:

> (1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –
>
> a) the reason (or if more than one, the principal reason) for the dismissal; and
>
> b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
>
> (2) A reason falls within this subsection if it –
>
> a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do;
>
> b) relates to the conduct of the employee;
>
> c) is that the employee was redundant, or
>
> d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

(3) …..

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –

a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee; and

b) shall be determined in accordance with equity and the substantial merits of the case.

78. The burden of proof is on the employer to show the reason or principal reason for dismissal, and that this was a potentially fair reason for dismissal. Once that is done then the burden of proof is neutral.

79. The reason for dismissal is the set of facts known to the employer, or beliefs held by him, which cause it to dismiss the employee (*Abernethy v Mott, Hay & Anderson [1974] ICR 323*).

80. The question is not whether the Tribunal would have taken the same action as the employer, but whether what occurred fell within the range of reasonable responses of a reasonable employer, both in relation to the decision itself and the procedure followed (*J Sainsbury plc v Hitt 2003 ICR 111, and Iceland Frozen Foods Ltd v Jones 1982 IRLR 439*).

81. If the dismissal is found to be unfair due to (at least in part) the procedure followed by the employer, then in considering the appropriate award of compensation, regard should be had to the likelihood that the dismissal would have taken place in any event, and the compensatory award may be reduced accordingly (*Polkey v AE Dayton Services Ltd 1988 ICR 142*). As explained in *King and ors v Eaton Ltd (No.2) 1998 IRLR 686*, "The matter will be one of impression and judgement, so that a tribunal will have to decide whether the unfair departure from what should have happened was of a kind which makes it possible to say, with more or less confidence, that the failure makes no difference, or whether the failure was such that one cannot sensibly reconstruct the world as it might have been". Further, in *Gover and ors v Propertycare Ltd 2006 ICR 1073*, CA, Lord Justice Buxton stated that "The tribunal [was] doing what it [was] engaged to do: to draw upon its industrial experience of circumstances such as this and to construct, from evidence not from speculation, a framework which is a working hypothesis about what would have occurred had the [employer] behaved differently and fairly…".

82. If the dismissal is found to be unfair but it is also found that the employee contributed to their dismissal through their conduct, then the basic and/or compensatory awards may be reduced to reflect this under section 122(2) and 123(6) of the ERA.

Breach of contract

83. Under section 86 of the ERA, an employee is ordinarily entitled to notice of termination of employment. Where the contract of employment specifies a period greater than that required under the ERA, that will take precedence.

Unpaid wages

84. Section 13(3) of the ERA provides that:

> "*Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion."*

Holiday pay

85. Workers are entitled to a minimum of 5.6 weeks' leave in each leave year under Regulations 13 and 13A of the Working Time Regulations 1998 ("WTR"). The contract of employment may provide for additional leave.

Discrimination

86. Section 13 of the Equality Act 2010 ("EA") (direct discrimination) provides that;

> (1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

87. Section 123 of the EA (time limits) provides that:

> (1) "….proceedings on a complaint within section 120 may not be brought after the end of -
>
> a) The period of 3 months starting with the date of the act to which the complaint relates, or
>
> b) Such other period as the employment tribunal thinks just and equitable.
>
> (2) ….
>
> (3) For the purposes of this section –
>
> a) Conduct extending over a period is to be treated as done at the end of the period;
>
> b) …

88. Section 136 of the EA (burden of proof) states that:

> (1) This section applies to any proceedings relating to a contravention of this Act.

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision.

Put simply, the claimant must show facts from which the Tribunal could infer that discrimination took place, in the absence of other explanation. If the claimant cannot do that, the claim fails. If the claimant does show such facts, then the burden shifts to the respondent to show that discrimination did not take place. In *Madarrassy v Nomura International [2007] ICR 867* CA, Mummery LJ stated that "the bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination."

89. In the House of Lords decision of *Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] UKHL 11, [2003] IRLR 285, ICR 337*, it was held by Lord Scott that "the comparator required for the purpose of the statutory definition of discrimination must be a comparator in the same position in all material respects of the victim save that he, or she, is not a member of the protected class".

90. In cases of direct discrimination, where there is less favourable treatment, the key question to be answered is why the claimant received less favourable treatment: was it on grounds of race or for some other reason (*Nagarajan v London Regional Transport 1999 ICR 877*).

ACAS Code of Practice on disciplinary and grievance procedures ("the ACAS Code")

91. Section 207A of the Trade Union & Labour Relations (Consolidation) Act 1992 states that:

1) ….

2) If, in the case of proceedings to which this section applies, it appears to the employment tribunal that –

a) the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies,

b) the employer has failed to comply with that Code in relation to that matter, and

c) that failure was unreasonable,

the employment tribunal may, if it considers it just and equitable, in all the circumstances to do so, increase any award it makes to the employee by no more than 25%.

92. In Lund v St Edmund's School, Canterbury 2013 ICR D26, EAT, it was held that the ACAS Code applied even though the employee was dismissed due to a breakdown in the employment relationship, because the employer had commenced disciplinary proceedings. In *Phoenix House Ltd v Stockman 2017 ICR 84, EAT*, however, the Employment Appeal Tribunal distinguished the *Lund* case and held that the ACAS Code was not intended to apply to cases where there was a dismissal because of a breakdown in the working relationship.

93. Where an adjustment is to be made to reflect an unreasonable failure to follow the ACAS Code, it is to be made after any reduction under *Polkey* but before any reduction for contributory fault (*Digital Equipment Co Ltd v Clements (No 2) [1998] ICR 258*).

Costs

94. Rule 76 of the Employment Tribunal Rules states:

> (1) A Tribunal may make a costs order or a preparation time order, and shall consider whether to do so, where it considers that –
>
> a) A party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted"

Conclusions

95. We address our conclusions by reference to the list of issues set out above. The Tribunal reached its conclusions unanimously.

Has the claimant issued all of his claims within the prescribed time limit for his claim to have been issued?

96. Although the Tribunal was not presented with a copy of the certificate, we were informed by the parties that ACAS early conciliation did take place and it was agreed that any alleged acts of discrimination occurring prior to 2 April 2020 were on the face of it out of time unless part of a continuing act. It was accepted by the respondent that all other claims had been brought within the required time limits, which we agree with.

97. No submissions were made by either party about time limits. Nevertheless, as this is a jurisdictional matter we have considered the issue. The claimant's allegations of discrimination revolve around the claimant's performance and the treatment of him in relation to that performance and his role as line manager. These acts are all connected and all relate to the same overall process. We therefore find that this was a continuing act, the last act of which was his dismissal, and therefore that the claim for race discrimination was brought within the required time limits. It is therefore not necessary to consider whether it would be just and equitable to extend time.

Unfair dismissal

98. It was accepted that the claimant was dismissed on 23 April 2020, and that the dismissal was unfair within the meaning of s94(1) Employment Rights

Act 1996 ("ERA"). It was further accepted that this was an "ordinary" and not "constructive" unfair dismissal.

99. The next question to address is whether the dismissal was for a potentially fair reason under the ERA. We conclude that the true reason for dismissal was that the respondent had originally thought the claimant was intending to resign, but when the claimant clarified that he was not, the respondent refused to acknowledge this and instead (albeit some weeks later) told the claimant that it was treating him as having resigned. This was not a misunderstanding, given that the claimant had made it clear in his second email of 5 March 2020 that he had not resigned. It was a misjudgment on the respondent's part. It clearly does not amount to a dismissal for any of the reasons set out in section 98(2) of the ERA and we conclude that it was also not some other substantial reason of a kind such as to justify the claimant's dismissal.

100. As the dismissal was not for a potentially fair reason, the dismissal is therefore unfair. However, for the avoidance of doubt, we also conclude that the respondent did not act reasonably in the circumstances by treating it as a sufficient reason for dismissal. This was a misjudgment and not a misunderstanding, as outlined above. Dismissal was not within the range of reasonable responses available to an employer in the respondent's position. Given the information available to the respondent, it would have been apparent that the claimant had not resigned and therefore that they should not have treated the claimant's failure to attend work as a resignation. Whilst the respondent was not a large organisation in the UK, it was sufficiently large to have an HR presence in the United States, which made itself available to support UK employees with HR matters (and the claimant had specifically clarified to HR that he had not resigned).

101. In circumstances where the claimant had confirmed that he had not resigned, and was subsequently dismissed by way of an email saying that he had resigned, the procedure followed by the respondent was also clearly deficient. There was no invitation to meeting, no meeting, no right of appeal and no opportunity for the claimant to state his case – not only in relation to the dismissal itself but also in relation to the circumstances which led to his dismissal, such as the concerns raised by the claimant in his email of 5 March 2020. In relation to the original performance process, Mr Budd had put considerable effort into ensuring the criteria were fair, there were sufficient meetings and opportunity to improve and that the concerns were discussed with the claimant. He also involved his own line manager and HR which added impartiality. There were a few areas where the process could have been improved, the more minor ones being the timely provision and signature of the PIP documents, and allowing additional time for the claimant to prepare for the first PIP meeting, however the more significant one being the failure to respond to the claimant's concerns raised on 5 March 2020.

102. Overall, we therefore conclude that the claimant was unfairly dismissed by the respondent. We address compensation in the remedy section below.

Direct race discrimination Equality Act 2010 s13 and 39

103. We address each of the individual allegations of race discrimination below by reference to the agreed list of issues.

Did the respondent treat the claimant less favourably in comparison to a hypothetical comparator who does not possess the same protected characteristic, namely being of Chinese ethnic/national origin by:

a. Failing to give the Claimant a reasonable opportunity to review the written performance review before the meeting to discuss that review

104. We have found that in fact the claimant was treated the same as other colleagues in this regard, in that no colleagues were given the opportunity to review the written performance review before their performance meetings. Therefore it is clear that there was no less favourable treatment and there are no facts from which the Tribunal could decide, in the absence of any other explanation, that discrimination has occurred. This allegation does not succeed.

b. Making unfair criticisms of him in that performance review

105. Whilst the list of issues referred to a hypothetical comparator, it became clear during the hearing that in fact the claimant sought to compare himself to Mr de Bruin in relation to this allegation, in that he argued that Mr de Bruin was "incompetent" but had faced no such criticism. In line with *Shamoon*, for Mr De Bruin to be a suitable comparator his circumstances would have needed to be the same in all material respects to the claimant save that he was of a different race. However, we have not found that to be the case: the only errors we have been pointed to from Mr De Bruin were from the first few months of his employment, whereas the claimant was by this point an experienced member of staff. We also did not accept as a matter of fact that Mr De Bruin was underperforming, whereas we did for the claimant. Therefore we do not find Mr De Bruin to be a suitable comparator. We therefore use the hypothetical comparator in considering this issue.

106. It is clear that both the claimant and Dr Wang received criticism of their performance. Both are of Chinese origin. There was no suggestion of any white colleagues receiving criticism of their performance. Whilst it would not be sufficient to shift the burden of proof for the claimant alone to have been criticised, given that the only two Chinese employees have faced performance concerns, we do find that on the face of it there are facts from which the court could decide, in the absence of any other explanation, that discrimination had occurred. The burden of proof therefore shifts to the respondent.

107. However, we have found that there was clear evidence of legitimate performance concerns in relation to the claimant, backed up by contemporaneous notes taken by Mr Budd. We have also found that, to the extent that Mr Budd may have had a negative perception of the claimant, this was caused by the claimant's behaviour in front of the respondent's CEO and the way in which he handled his tax issues. We concluded that these matters were unrelated to the claimant's race and that it was understandable why a negative perception of the claimant might be formed based on those matters.

108. We therefore conclude that the respondent has shown that it did not treat the claimant less favourably than it did treat or would have treated others because of the claimant's race, i.e. it has shown a non-discriminatory reason for the treatment. This allegation does not succeed.

c. Instituting a PIP without reasonable cause

109. Again, we have considered whether Mr De Bruin is a suitable comparator here, and have concluded that he was not, for the same reasons as set out above.

110. We also find that the burden of proof has again shifted to the respondent to prove that discrimination took place. Mr Budd has only subjected two employees at the respondent to a PIP: the claimant and Dr Wang, both of Chinese origin.

111. However, we have found that the criticisms levelled at the claimant were, on the whole, fair and reasonable and that there were solid non-discriminatory grounds for implementing a PIP. The PIP was comprehensive and was balanced, recognising areas where the claimant's performance was improving. In addition, we note that Mr Budd could have dismissed the claimant fairly in the first few months of his employment due to the legitimate performance concerns at that time, but chose not to do so, demonstrating Mr Budd's genuine commitment to supporting the claimant to improve performance. We conclude that the respondent has shown that the PIP was implemented for sound, non-discriminatory reasons, and this aspect of the claimant's claim fails.

d. Unreasonably criticising his performance during the course of that PIP;

112. We conclude that Dr Wang's performance must also have been criticised during her PIP, given that she was ultimately dismissed for poor performance. Therefore the analysis set out in (b) and (c) above applies equally here and the burden of proof again shifts.

113. However, as for (b) and (c) above, the respondent has demonstrated that there were valid grounds to criticise the claimant's performance during the PIP, and has also shown that due recognition was given in areas where the claimant's performance did improve. We therefore conclude that the respondent has shown that it did not treat the claimant less favourably than it treated, or would have treated, others. This aspect of the claimant's claim also fails.

e. *Criticising him for his conduct with Sameera Amin*

114. Here, the claimant argued that there was in fact an actual comparator, Ms Gallagher. We therefore considered whether she was a suitable comparator in line with the *Shamoon* decision. It is common ground that in both the claimant and Ms Gallagher had incidents with Ms Amin which upset Ms Amin, and that both the claimant and Ms Gallagher had been line managers of Ms Amin at the relevant time. However, there were also material differences in their circumstances. First, Mr Budd was physically present at the incident where the claimant upset Ms Amin and heard the whole conversation (and notably heard the claimant behave inappropriately, in circumstances where he already had legitimate concerns about the

claimant's ability to lead his team effectively), whereas whilst he witnessed Ms Amin's reaction to her interaction with Ms Gallagher, he had not heard the whole conversation. Secondly, at the time of the claimant's incident, Ms Amin was in a particularly fragile state which was known to both the claimant and Mr Budd. Thirdly, following the incident with the claimant, Ms Amin left the workplace and called in sick the following day. A suitable comparator would have been a manager who, knowing the fragile state of mind of their direct report, nevertheless upset them through inappropriate conduct, witnessed by Mr Budd. We therefore conclude that Ms Gallagher was not a suitable comparator. In any case, we would add that we heard no evidence to suggest that Ms Gallagher behaved inappropriately during her interaction with Ms Amin.

115. We have considered whether the claimant was treated less favourably than a hypothetical comparator would have been. The fact that the claimant was criticised does not in itself shift the burden of proof. However, the claimant emailed Ms Freeman on 5 March 2020 (page 2-291) to raise concerns about the way he was treated in relation to his management of Ms Amin, alleging that this was discriminatory. He received no reply to that email and was not invited to any grievance meeting to discuss it. In essence, it was completely ignored. We are aware that there were other issues ongoing between the parties at this time and that the respondent thought that the claimant's employment was ending, however that does not negate the importance of addressing allegations of discrimination. This, in our view, does constitute facts from which we could decide, in the absence of any other explanation, that the respondent discriminated against the claimant. The burden of proof therefore shifts.

116. At the relevant time, the respondent had concerns about the claimant's performance, including specifically his line management skills. He showed poor judgment and intransigence in the way he handled his discussions with Ms Amin, and this is especially so once her health concerns are taken into account.

117. There was also a second incident whereby Ms Amin called in sick and the claimant did not ask her how she was. In evidence the claimant did not seem to accept that this would have been a sensible question for him to have asked, as her line manager. This would have reasonably compounded the respondent's concerns.

118. Therefore, taking the above into account, we conclude that the respondent has shown that there were non-discriminatory reasons for its treatment of the claimant, namely its legitimate concerns about the way he interacted with Ms Amin, and the claimant's claim in this regard fails.

f. Removing Sameera Amin from his line management

119. For the same reasons as set out in (e) above, we conclude that Ms Gallagher was not an appropriate comparator, but that the burden of proof did shift to the respondent to prove that discrimination did not take place.

120. Factoring in the circumstances identified at (e) above, the respondent has demonstrated legitimate concerns about the claimant's ability to manage Ms Amin appropriately. This is compounded by the fact that Ms Amin's health

was fragile at the time, making it even more important for the respondent to ensure that Ms Amin was line managed by someone who could treat her with sensitivity and compassion. In the circumstances it was reasonable for the respondent to remove line management responsibility for Ms Amin from the claimant and the respondent has shown non-discriminatory reasons for doing so.

g. Failing to deal with his discrimination complaint reasonably or at all.

121. It is accepted that the respondent did not deal with the claimant's complaint of discrimination. The complaint was sent by email to HR, and clearly stated that the claimant felt that he had been discriminated against. It should have been obvious to the respondent that this was a matter which warranted investigation. In these circumstances, the claimant has shown facts from which, absent any other explanation, the Tribunal could decide that discrimination had occurred.

122. However, whilst we rejected the respondent's submission that this was due to a misunderstanding, we did accept that it was due to a misjudgment rather than for any discriminatory reason.

123. Therefore, whilst we conclude that the respondent's treatment of the claimant in this regard was inappropriate, we also conclude that the respondent has shown a non-discriminatory reason for that treatment, and that the respondent did not treat the claimant less favourably that it treated or would have treated others who were not of Chinese origin. This allegation therefore fails.

h. Dismissing him

124. It is now common ground that the respondent did dismiss the claimant. However, the claimant has put forward no evidence to link that dismissal to his race, and in fact in evidence appeared to suggest that he did not believe it to be linked to his race. We have found that the claimant's dismissal was due to a misjudgment on the respondent's part.

125. Therefore, we do not believe that the claimant has shown facts from which the Tribunal could conclude that an act of race discrimination occurred. This allegation fails.

Breach of contract

126. The respondent admits that it breached the claimant's contract of employment by not paying him the notice to which he was entitled.

127. The claimant was entitled to one month's notice of termination of employment. He received no notice.

128. The parties helpfully agreed between themselves the amount of notice that is due to the claimant, and we see no reason to depart from those figures. We address the relevant figures in the remedy section below.

Holiday pay

129. It was also common ground between the parties that the claimant was entitled to accrued holiday relating to the period between 4 April 2020 and 23 April 2020, this being the period during which the respondent initially argued that the claimant's employment had ended but had now conceded that it had not.

130. Again, the parties helpfully agreed the relevant holiday pay figures, which we adopt, and these are set out in the remedy section below.

Unpaid wages

131. The parties also agreed that the respondent owed the claimant unpaid wages in respect of the period between 4 April 2020 and 23 April 2020, and we set out the relevant figures in the remedy section below.

Remedy

Unfair dismissal

132. In relation to the finding of unfair dismissal, we conclude as follows:

    a) If the claimant had not been dismissed on 23 April 2020, he would have remained on the PIP until the 60 day period had expired. We conclude that, given that the claimant did not attend work between 4 March and 23 April the respondent would in all likelihood have paused the 60 days during that period, therefore the 60 day PIP period would have run until around 26 May 2020. Allowing a few days for matters to be considered by the respondent at the end of the PIP period, we conclude that the potential termination date at the end of the PIP would have been the end of May 2020.

    b) The claimant was clearly underperforming and continuing to do so during the PIP period prior to him ceasing to attend work, and we believe that there was a high chance that he would have continued to underperform to the end of the 60 day period and would therefore have been fairly dismissed for capability at that point. This is particularly so given the claimant's refusal to accept most of the criticism levelled at him or to accept the need to change. Having said that, it is also clear that there were some areas where the claimant was making improvements, and it is possible that he could have continued to improve throughout the period. We also conclude that, given that Mr Budd gave the claimant significant leeway in the early months of his employment and ultimately did not dismiss him despite considerable underperformance at that point, had the claimant improved to a satisfactory level Mr Budd would not have dismissed the claimant. Whilst the respondent asserted that the claimant would have left anyway because he was already applying for alternative roles, we conclude that was prompted by Mr Budd's criticisms of him and, if those criticisms were to stop, he would also have stopped looking elsewhere. Taking all of that into account, we conclude that there was an 80% chance that the claimant would have been dismissed at the end of the PIP period and therefore make an 80% reduction to compensation under *Polkey*.

c) Had the claimant not been dismissed at the end of the PIP period, we accept that he would have remained in employment with the respondent (and for the avoidance of doubt we do not conclude that he would have been dismissed for disclosing confidential information in a job application: in our view had the relationship between the parties not broken down, the respondent would not have searched the claimant's email address and would not have known about the job application, but even if it had we are not convinced that it would have been viewed as serious enough to warrant dismissal). However, we conclude that his employment would inevitably have come to an end by the time of this hearing due to the closure of the claimant's place of work. We consider the chances of him relocating to the USA being too remote to factor into any calculations.

d) We also conclude that the claimant contributed to his own dismissal, through his intransigence and also due to his conduct around the time of his purported resignation. Whilst straightforward underperformance would not in our view justify a finding of contributory fault, in this case the circumstances around the dismissal arose in large part because of the claimant's attitude towards his colleagues and his refusal to accept any responsibility for the concerns held by the respondent. In addition, around the time of the claimant's purported resignation, the claimant was emailing colleagues to tell them that he was leaving and he made no attempt to return to work or to ask if he could do so prior to his dismissal. We therefore find that compensation should be reduced by 50% to reflect the claimant's contributory conduct to the circumstances leading to his dismissal. This applies to both the basic and compensatory awards.

e) We conclude that there has been a failure to follow the ACAS Code. Whilst it was submitted by the respondent that the ACAS Code does not apply in dismissals of this nature in light of the *Phoenix* case, this is not a simple case where there has been a dismissal because of a breakdown in the working relationship. In this case, there was a clear performance process underway, during which the respondent misjudged communications between itself and the claimant resulting in it dismissing him. Part of those communications was the claimant's email dated 5 March 2020 in which he clearly complained about the process that was being followed, alongside raising other complaints including race discrimination. The general principles of the ACAS Code do apply to performance matters (albeit that the Code recognises that employers may have their own procedures to follow). Whilst the respondent followed a detailed performance process and was initially committed to supporting the claimant to try to improve, there were certain failures. First of all the there was a failure to provide notes in a timely manner during the PIP process, and to allow the claimant additional time to prepare for the first PIP meeting. However, overall, we see these transgressions as minor in nature given the detail that went into the PIP overall. However, more importantly, the claimant's email dated 5 March 2020 (page 2-291) raised a number of concerns about what was happening to him, including allegations of discriminatory conduct and an unfair process. There was a complete failure to address those concerns. Whilst the dismissal was not for performance reasons, it stemmed from those performance concerns

and from the failure to address the claimant's concerns in that email (because, if it had addressed those concerns properly, it would have appreciated that he had not resigned). Therefore we apply a 15% uplift in compensation for the respondent's unreasonable failure to follow the ACAS Code.

f) There was no failure to take reasonable steps to mitigate loss: the claimant was applying for new roles before he even left the respondent's employment and we believe that he took appropriate steps to seek alternative roles. We conclude that it is appropriate to compensate the claimant for the difference in earnings between his role at the respondent and his role at Accendolab Limited for a period of one year from October 2020, taking account of the information available to us about the claimant's attempts to find suitable employment and the circumstances (including the pandemic).

g) Whilst we accept that the claimant had stock options, the terms of the stock options were clear and the claimant did not do what was needed to preserve his eligibility following his dismissal. Whilst we can understand that the claimant might not have focused on such matters and/or realised what he needed to do, the fact remains that the claimant could have taken action to preserve them but did not do so. In addition, in order for them to have any real value, this would have required the respondent to float which, as at the date of this hearing, it had not done and there was no evidence to suggest that doing so was likely to happen at any time in the near future. The claimant had also valued his stock options by using hypothetical calculations based on another company entirely. We therefore consider the possibility of any payment under these stock options to be too remote to warrant any compensation.

133. The claimant's pay was as follows:

a) At the respondent:

i. Net monthly pay of £3,066

ii. Net weekly pay of £707.54 (£3,066 x 12, then / 52)

iii. Net daily pay of £141.51 (net weekly pay / 5)

iv. Employer pension contributions of £163 per month, equating to £37.62 weekly, and £7.52 daily.

b) At Accendolab, net monthly pay of £2,570.37.

134. The claimant is therefore entitled to a basic award of £1,614 (based on £538 per week x 1.5 x 2), reduced by 50% to account for contributory fault, totalling **£807**.

135. In relation to the compensatory award, the claimant is entitled to:

a. Loss of salary to the end of the PIP period. When the claimant stopped attending work on 4 March 2020, he had completed 26 days of the PIP period (6 February to 3 March inclusive). There were therefore 34

days remaining, which would have recommenced on 24 April 2020. Allowing a small number of days to allow for timetabling of meetings, we anticipate that the claimant's employment would have ended at the end of May 2020. This means that he would have had a further period of employment of one month and one week. Using the figures above, this would amount to net earnings of £3,066 plus £707.54, totalling **£3,773.54 net**. In addition, he would have been eligible for pension contributions during this period of £163 + £37.62 totalling **£200.62.** There would be no Polkey deduction from these figures given that we have found that he would have been employed to this date (and not only a chance that he would have been), and we address other deductions/increases below.

b. The claimant would then have been awarded one month's notice to the end of June 2020, however as we are compensating the claimant for his notice period separately, we do not set that out again here.

c. He would then have had full loss of earnings between 1 July 2020 and 19 October 2020. This is three complete months plus 12 working days, amounting to (3 x £3,066) + (12 x 141.51) = £10,896.12 net. This is subject to an 80% Polkey reduction which results in a total of **£2,179.22 net**. In addition he would have received pension contributions of (3 x £163) + 12 x 7.52) = £579.24, again subject to an 80% reduction leaving total pension losses during this period of **£115.85**. We address other deductions/increases below.

d. We award the claimant one year's difference in earnings once he started his new employment at Accendolab. His net monthly salary at Accendolab was £2,570.37, which means that the difference in net monthly salary between his employment with the respondent and that at Accendolab was £495.37 per month. This results in a difference of £5,947.56. However, whilst we find no evidence that there would have been a payrise in either role, we have seen evidence that a £200 bonus was awarded to the claimant in December 2020. This should be deducted from the total, however this was entitled Year End Bonus and on balance we conclude no further bonus would have been payable during the one year period for which we are compensating the claimant. The claimant's net pay at Accendolab was approximately 77% of his gross pay and therefore the £200 bonus would equate to £154 net. This results in the total net difference in pay being £5,793.56. Again an 80% Polkey deduction should be applied, resulting in a total figure of **£1,158.71 net**. We do not make any award in respect of ongoing pension loss, because we note that the claimant should have been eligible to join a pension scheme at Accenolab.

e. We award the claimant £500 in respect of loss of statutory rights, taking into account the current economic climate notably the pandemic. An 80% Polkey deduction is to be applied, resulting in a total figure of **£100.**

136. The total compensatory award (including reductions for Polkey but not including other reductions) is therefore:

a) To 31 May 2020: £3,974.16 net;

b) 31 May 2020 to 30 June 2020: notice period, awarded separately;

c) 1 July 2020 to 19 October 2020: £2,295.07 net;

d) 19 October 2020 to 18 October 2021: £1,158.71 net; and

e) Loss of statutory rights of £100.

This totals £7,527.94. This is then increased to reflect the respondent's unreasonable failure to follow the ACAS Code by 15%, increasing the total to £8.657.13. From this we then deduct 50% to reflect the claimant's contributory fault, reducing the total to **£4,328.57 net**. The recoupment provisions do not apply.

137. We award **£500** in respect of loss of statutory rights.

Notice pay

138. The claimant is owed £3,066 net in respect of notice pay. This is to be uplifted by 15% to reflect the respondent's unreasonable failure to follow the ACAS Code, resulting in a total of **£3,525.90 net**.

Holiday

139. The parties agreed that the claimant had 1.3 days' accrued but untaken holiday outstanding. The claimant's daily gross rate of pay was £187.85 (based on his monthly gross salary of £4,070), therefore 1.3 days' holiday equates to £244.21 gross. Again, this is to be uplifted by 15% to reflect the respondent's unreasonable failure to follow the ACAS Code, resulting in a total of **£280.84 gross.**

Unpaid wages

140. The claimant's employment terminated on 23 April 2020 but he was only paid up to and including 4 April 2020. This was a period of 14 working days, amounting to £2,618 gross. Unpaid pension contributions during that 14 day period at a day rate of £7.52 amount to £105.28, with total unpaid wages therefore amounting to £2,723.28. Again, this is to be uplifted by 15% to reflect the respondent's unreasonable failure to follow the ACAS Code, resulting in a total of **£3,131.77 gross**.

Race discrimination

141. As the claimant's claim for race discrimination has not succeeded, no compensation is due to him in this regard.

Costs

142. The claimant's representative put forward during the hearing that aggravated damages and/or costs should be awarded due to the respondent's late concession of unfair dismissal. This was on the basis that it was because the respondent had disputed that the claimant was dismissed that the claimant had instructed legal representation in this case, and that the concession had only been made shortly before the hearing despite all the relevant information being known to the parties considerably

in advance. Given that we have not made a finding of race discrimination, aggravated damages are not relevant in this case.

143. We accept that the respondent did concede the unfairness of the dismissal at a late stage, and it is disappointing that the respondent did not appreciate its position at an earlier stage particularly given that it was legally represented from the outset. However, we do not believe that the respondent was being deliberately obstructive in this regard and instead believe that the respondent misjudged its position. The respondent did concede unfair dismissal, albeit belatedly, meaning that this issue did not need to be addressed at the hearing, and the claimant was made aware of that before the hearing commenced. There was no evidence from the claimant to say that he would not have instructed legal representation had dismissal been conceded, and we find on balance that he would have still be likely to do so, given that this formed only part of his claim and that the value of compensation was still in significant dispute. In addition, no detailed submission was made as to any breakdown in costs. Having considered Rule 76, we do not believe that it would be appropriate to make an award of costs in this case.

Other matters

144. The claimant's representative put forward a document entitled "loss of income" on the final day of the hearing. This included a figure of £2,006 for "wrong tax filing". The claimant brought no claim in relation to any incorrect tax filing, nor was any evidence provided by either party to either prove or disprove whether an incorrect tax filing was made. We therefore make no award in this regard.

Employment Judge Edmonds

10 May 2022

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON:
20 May 2022

FOR EMPLOYMENT TRIBUNALS